Supreme Court, U. S.
FILED
FEB 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-772

In the Supreme Court of the United States

OCTOBER TERM, 1976

COUNTY COMMISSION, HALE COUNTY, ALABAMA, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

DANIEL M. FRIEDMAN,
Acting Solicitor General,

DREW S. DAYS, III,
Acting Assistant Attorney General,

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The district court's opinion and order of October 18, 1976 (J.S. App. A1-A8), and a supplement to its opinion and order filed on January 24, 1977 (App., *infra*, pp. 1a-8a), are not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on October 18, 1976 (J.S. App. A9-A11). Notice of appeal was filed on November 15, 1976 (J.S. App. A12-A13), and the jurisdictional statement was filed on December 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the designation by appropriate federal officials of the State of Alabama as a state subject to the Voting Rights Act of 1965, 42 U.S.C. 1973b, *et seq.*, operates to subject all subdivisions of that state to the Act.

STATEMENT

Pursuant to Section 4(b) of the Voting Rights Act of 1965, 79 Stat. 438, as amended, 42 U.S.C. (Supp. V) 1973b(b), the State of Alabama was designated by the Attorney General and the Director of the Census on August 6, 1965, 30 Fed. Reg. 9897, as one of several States covered by the preclearance provisions[1] of Section 5 of the Act, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c. See J.S. App. A3.

Prior to November 1, 1964, the critical date for Section 5 purposes,[2] the commissioners of Hale County, Alabama, were elected by single-member districts.[3] Since passage of

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[1]Section 4(b) of the Act, as amended, 42 U.S.C. (Supp. V) 1973b(b), makes the Act applicable "in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein" were registered or voted in November, 1964. Section 5 of the Act, as amended, 42 U.S.C. (Supp. V) 1973c, requires that "[w]henever a State or political subdivision with respect to which" such determinations have been made enacts or seeks to administer any "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" such state or subdivision must first obtain either a declaratory judgment from a three-judge District Court for the District of Columbia that such change does not have a discriminatory purpose or effect, or must submit such change to the Attorney General for preclearance.

[2]See note 1, *supra*.

[3]Act No. 360 (H. 838), Acts of Alabama 1959, Vol. II, pp. 961-962; see also J.S. 7 and J.S. App. A4.

the Voting Rights Act, the Alabama legislature has enacted three laws effecting voting changes within Hale County. On August 10, 1965, the legislature provided that county commissioners would be elected at large from residency districts.[4] On September 20, 1971, the legislature provided that county commissioners of Hale County would be elected at large, but with no residency requirement other than that a candidate be a resident of Hale County.[5] Finally, on August 27, 1973, the legislature reverted to at-large elections from residency districts, but the districts were different from those that had been in effect from 1965 to 1971.

None of these enactments nor any of the election procedures referred to therein was submitted to the Attorney General for clearance under Section 5 of the Voting Rights Act, and no action was instituted in the United States District Court for the District of Columbia, pursuant to Section 5,[6] for a declaratory judgment (J.S. App. A5).

On July 31, 1976, the Attorney General, acting pursuant to Section 12(d), 79 Stat. 444, 42 U.S.C. 1973j(d), instituted this action in the district court to enjoin the election of county commissioners in Hale County scheduled for November 2, 1976, for failure to comply with Section 5.

The three-judge district court held, *inter alia*, that:

(1) Hale County "is a political and geographical subdivision of the State of Alabama" (J.S. App. A3);

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[4]Act No. 320 (H. 764), Acts of Alabama 1965, Vol. I, pp. 439-440. See also J.S. 7. The change was made subject to approval by referendum, and was so approved on November 30, 1965. J.S. App. A4.

[5]Act No. 2022 (H. 2507), Acts of Alabama 1971, Vol. IV, pp. 3261-3262; see J.S. 7; J.S. App. A4.

[6]See note 1, *supra*.

(2) The Voting Rights Act of 1965 applies to Hale County and, therefore, the election procedures for county commissioners changed by the 1965, 1971 and 1973 legislative enactments referred to above are subject to the preclearance requirements of Section 5 (J.S. App. A6); and

(3) Appellants had failed to meet Section 5's preclearance requirements with respect to those three enactments and, therefore, those acts "are of no force or effect" and any elections conducted pursuant to them "are and were unlawful" (J.S. App. A6-A7).

The district court declined to enjoin the 1976 general election but ordered that the two commissioners to be elected (and the two commissioners whose terms extended beyond the November 1976 elections) "shall serve provisionally pending the further orders and decrees of this court" (J.S. App. A7). The court also ordered appellants to submit to the Attorney General the 1965, 1971 and 1973 laws which had not been precleared (J.S. App. A7). The court ordered that if the Attorney General objected to the enactments, the appellants would have 30 days to file suit under Section 5 in the District Court for the District of Columbia.[7] If they chose not to file suit, or if the District Court for the District of Columbia neither reversed the Attorney General's decision nor upheld the constitutionality of the 1973 enactment, then elections, by district, were to be held promptly (J.S. App. A8). Appellants' submission was received on November 4, 1976, by the Attorney General, who interposed an objection on December 29, 1976.[8]

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[7] On motion of appellants, the district court later extended this date through February 15, 1977. Appellants have so filed.

[8] A copy of the Attorney General's letter of objection is attached as an Appendix to this Motion. App., *infra*, pp. 9a-11a.

ARGUMENT

Appellants' only contention on this appeal is that Hale County, Alabama, is not covered by Section 5 of the 1965 Voting Rights Act because the Attorney General and the Director of the Census did not specifically designate Hale County in the published notice of coverage, 30 Fed. Reg. 9897 (August 7, 1965) (J.S. 9). This argument is without substance.

In the first place, the voting changes involved were enacted by the state legislature and are therefore subject to Section 5 even if special designation of Hale and other Alabama counties was required with respect to legislation enacted by county commissioners. The Jurisdictional Statement does not address this fundamental point which, in our view, is dispositive of this appeal.

Second, appellants' contention that the Attorney General and Director of the Census must specifically designate political subdivisions within a designated state is contrary to the language of the Act, its legislative history, and eleven years of uniform practice under it. Section 4(b) provides (emphasis added) that "[t]he provisions of subsection (a) of this section shall apply *in any State* or in any political subdivision of a State" for which the requisite determinations have been made by the Attorney General and the Director of the Census. Section 5 then applies "[w]henever a State or political subdivision with respect to which" Section 4(a) applies seeks to enact a voting change. The Attorney General and the Director of the Census, in an action not challenged here,[9] designated Alabama as one of several States to which Section 5's preclearance requirements applied, and the political subdivisions within Alabama are

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[9] *South Carolina* v. *Katzenbach*, 383 U.S. 301, upheld the constitutionality of Section 4 of the Act.

thereby included in that designation. Furthermore, since the Act (Section 14(c)(2), 79 Stat. 445, 42 U.S.C. 1973 *l*(c)(2)) defines "political subdivision" to mean "any county," the coverage of counties by the designation of an entire state was obviously contemplated by the Act.

In addition, as the district court properly concluded (App., *infra*, pp. 4a-6a) the legislative history of the Voting Rights Act unequivocally contradicts appellants' position. Both the House and Senate Committee Reports specifically stated: "Where an entire State falls within this subsection [i.e., Section 4(b)], so does each and every political subdivision within that State." H.R. Rep. No. 439, 89th Cong., 1st Sess. 25 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., Part 3, 23 (1965).

Finally, as the district court noted (App., *infra*, pp. 6a-7a), its conclusion that the designation of Alabama brought Hale County within the Act is supported by the construction given to Section 5 by this Court in several cases. For example, in *Perkins* v. *Mathews*, 400 U.S. 379, 381 n. 2, this Court stated, "Mississippi and its subdivisions have been determined to be covered by the Act," citing the designation of Mississippi in the same Federal Register notice that also named Alabama and which appellants now argue did not operate to include Alabama's subdivisions. The coverage of Louisiana "and its political subdivisions" by the same notice was routinely noted in *Beer* v. *United States*, 425 U.S. 130, 133, n. 2.

In short, appellants' reading of the statute (for which they cite no authority) is manifestly incorrect and the district court properly rejected it.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DREW S. DAYS, III,
Acting Assistant Attorney General.

WALTER W. BARNETT,
JOHN C. HAMMOCK,
Attorneys.

FEBRUARY 1977.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION

No. 76-403-P

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

COUNTY COMMISSION, HALE COUNTY, ALABAMA, CLIFTON ABERNATHY, HARRY DRAKE, GOLDSBY TUCKER, AND JOHN STOKES, COMMISSIONERS; RICHARD M. AVERY, PROBATE JUDGE; AND W. H. KNIGHT, CHAIRMAN OF THE HALE COUNTY DEMOCRATIC EXECUTIVE COMMITTEE,
DEFENDANTS.

SUPPLEMENT TO OPINION AND ORDER DATED OCTOBER 18, 1976

On the 18th day of October, 1976, this court rendered an opinion and order in this cause. The court stated:

> That this court concludes that the provisions of 42 U.S.C. 1973 are applicable to Hale County, Alabama, and the election procedures for County Commissioners in that county effected by legislative enactments as hereinafter set out since the passage of the 1965 Voting Rights Act are covered by Section 1973d (Section 5 of the Voting Rights Act of 1965[2] . . . .

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[2]An opinion on this conclusion will follow in the near future.

The following is the opinion indicated in the footnote.

The defendants, County Commission, Hale County, Alabama, et al., contend that the Voting Rights Act of 1965 has no application to the Hale County Commission. They submit "that the failure of the Attorney General of the United States and the Director of the Census to designate by publication in the Federal Register Hale County, Alabama, as a political subdivision under Section 1973b(b)" precludes applying Section 5 and other provisions of the Voting Rights Act of 1965 to Hale County.[1]

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[1]Section 1973b(b) of 42 U.S.C. states:

"Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register
(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972; or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under Section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

See also §1973c:

"§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973 b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceedings if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission,

Plaintiffs counter that the designation of a state automatically subjects all political subdivisions in that state to the preclearance requirements of Section 5 of the Act.

The parties do not dispute that Alabama is a political subdivision as defined in Section 1973e [*sic*] (c)(2):

> (2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

Alabama was designated as one of the seven states which came within the above statutory formula concerning Section 5 coverage. 30 Fed. Reg. 1897 [*sic*] (1965).

The legislative history of the Voting Rights Act, as well as subsequent cases dealing with its interpretation and enforcement makes it clear that the August 7, 1965, designation applied to those states so designated including all of its political subdivisions. The House Majority

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or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub. L. 94-73, Title II, §§204, 206, Title IV, §405, Aug. 6, 1975, 89 Stat. 402, 404."

Report (Judiciary Committee) No. 439, June 1, 1965, in discussing subsection 4(b)(1) and 4(b)(2), stated:

> 4(b)(1) - This is the first of the determinations which must be made before the provisions of subsection 4(a) become operative. The Attorney General must determine that a State or any political subdivision of a State maintained any test or device on November 1, 1964, as a qualification for voting.
>
> 4(b)(2) - This subsection sets forth the determinations which the Director of the Census must make before the provisions of subsection 4(a) become operative. The Director of the Census must determine that less than 50 per centum of the persons of voting age residing in any State or any political subdivision of a State were registered to vote on November 1, 1964, or voted in the presidential election of 1964. The vote in the presidential election of 1964 is the vote cast for the presidential candidates. *Where an entire State falls within this subsection, so does each and every political subdivision within that State.* (Emphasis added.) U.S. Code Cong. Adm. News 89th Cong., 1965, Vol. II, page 2456.

Twelve members of the Senate Judiciary Committee made substantially the same point in referring to Subsection 4(b)(2):

> This subsection [4(b)(2)] sets forth the two determinations which the Director of the Census must make under the first formula before the provisions of subsection 4(a) become operative:
>
> (a) First, the Director of the Census must determine that less than 50 percent of the persons of voting age, other than aliens and persons in active military service and their dependents, residing in any State or any political subdivision of a State were registered to vote on November 1, 1964, or

voted in the presidential election of 1964. The exclusion from voting age population of aliens and military persons was added by the committee. The vote in the presidential election of 1964 is the vote cast for the presidential candidates. *Where an entire State falls within this subsection, so does each and every political subdivision within that State.* (Emphasis added.)

(b) Second, the Director of the Census must determine that, according to the 1960 Census, more than 20 percent of the persons of voting age were nonwhite in any State or political subdivision of a State. *Where an entire State falls within this subsection, so does each political subdivision within that State.* (Emphasis added.) This determination was not required in the bill as introduced. U.S. Code Cong. Adm. News 89th Cong. 1965, Vol. II, pages 2560, 2561.

The treatment of cases arising under the Voting Rights Act by both the Supreme Court and the lower federal courts strongly suggests that defendants' interpretation cannot be sustained. The Supreme Court has found that Congress intended that Section 5 have the "broadest possible scope" and that it "reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections,* 393 U.S. 544, at 566-567, 89 S. Ct: 817, 22 L.Ed.2d 1 (1969). The central issue in *Allen* was the coverage by Section 5, including coverage of two counties in the State of Mississippi. The Supreme Court stated that ". . . the balance of legislative history . . . indicates that Sec. 5 applies to these cases." 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d at 20.

In *Perkins v. Mathews,* 400 U.S. 397, 27 L.Ed.2d 476 (1971), a suit involving changes by the City of Canton, Mississippi, in boundary lines, polling places, and electoral methods, the Supreme Court declared that, "Mississippi

and its subdivisions have been determined to be covered by the [Voting Rights] Act. 30 Fed. Reg. 9897 (August 6, 1965)," 400 U.S. at 382, 27 L. Ed. 2d at 481, n. 2, even though only the State of Mississippi was designated by the Attorney General and the Director of the Census. More recently, in *Beer v. United States,* U.S. , 47 L.Ed.2d 629 (1976), a case involving a reapportionment plan for the City of New Orleans, the Supreme Court reiterated that the coverage of the preclearance requirements of the Act applies to all political subdivisions of a designated state when it said, "Louisiana and its political subdivisions are subject to the provisions of §4 [of the Act]." (cite omitted) U.S. at , 47 L.Ed.2d at 635, n. 2.

Indeed, the affected jurisdictions themselves have often at least impliedly conceded that designation of a state is tantamount to designation of all political subdivisions within that state.

In *U.S. v. Garner,* 349 F. Supp. 1054 (N.D. Ga. 1972), a three-judge district court held that where the City of Jonesboro had failed to timely secure favorable determination of a proposal to change an election standard, the municipal election in which the changes were implemented was unlawful and a new election was required. The parties stipulated that the "provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973c, apply to the City of Jonesboro, Georgia." 349 F. Supp. at 1055. In *City of Petersburg, Virginia v. United States,* 354 F. Supp. 1021 (D.C. D.C. 1972), judgment aff'd, see 93 S. Ct. 1441 (1973), (a declaratory judgment action by the City seeking preclearance of a proposed annexation) it was acknowledged that the "City of Petersburg, like all political subdivisions of the Commonwealth of Virginia, is required to clear changes in its voting procedures in accordance with Section 5 of the Voting Rights Act of 1965 as amended, 79 Stat. 439; 42 U.S.C. Sec. 1973c." 354 F. Supp. at 1022.

The above cases are not binding precedent in its strictest sense since the issue here posed was not clearly joined. They do, however, indicate a reasoned judgment by these parties and the courts that the coverage of the Act was to include all the political subdivisions of any designated state.

It is therefore ORDERED, ADJUDGED, and DECREED that the provisions of 42 U.S.C. Sec. 1973 are applicable to Hale County, Alabama, by reason of Alabama having been designated as set out in "Appendix A" to the October 18, 1976, Opinion and Order, and the election procedures for County Commissioners in that county were affected by legislative enactments as set out in that Opinion and Order and referred to in the Judgment entered.

Done, this the 24th day of January, 1977.

/s/ John Godbold
United States Circuit Judge

/s/ Virgil Heiman
United States District Judge

/s/ W. B. Hand
United States District Judge

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
24TH DAY OF JANUARY, 1977,
MINUTE ENTRY
NO. 42756
WILLIAM J. O'CONNOR, CLERK
BY /s/ L. Betancour
Deputy Clerk

December 29, 1976

T. 12/10/76

JSP:AJK:mrk
DJ 166-012-3
V7804; X8956-58

Mr. W. McLean Pitts
Pitts, Pitts & Thompson
Attorneys at Law
P. O. Drawer 537
Selma, Alabama 36701

Dear Mr. Pitts:

This is in reference to Act 320 (1965), Act 2022 (1971), and Act 620 (1973) which provide for the method of electing the governing body of Hale County, Alabama. These acts were submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on November 4, 1976.

In making a determination under the Voting Rights Act, we apply the legal principles developed by the courts in the same or analogous situations. We are aware that 66% of the population in Hale County is black and that the black population therefore constitutes a numerical majority. As the court stated in *Graves* v. *Barnes*, 343 F. Supp. 704, 730 (1972):

> In the context of the Constitution's guarantee of equal protection "minority" does not have a merely numerical denotation; rather it refers to an identifiable and specially disadvantaged group.

In affirming the District Court's decision the Supreme Court stated in *White* v. *Regester*, 412 U.S. 755 (1973) that the test to be applied was whether such a minority had been excluded from effective participation in political

life. The Court held that such a finding was sufficient to sustain the District Court's decision that single-member districts were required.

Each of the submitted Acts provides for the governing body to be elected on an at-large basis as opposed to the previous method of electing by single-member districts. Our investigation has resulted in the conclusion that the black population of Hale County has been prevented from entering the political process in a reliable and meaningful manner. This is evidenced by the fact that in Hale County no black has ever been elected to county-wide office.

Under these circumstances, I am unable to conclude, as I must under the Voting Rights Act, that the use of an at-large election system in Hale County will not have the effect of discriminating on account of race. I must, therefore, on behalf of the Attorney General, interpose an objection to the implementation of Act 320 (1965), Act 2022 (1971), and Act 620 (1973). Of course, as provided by Section 5, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these Acts have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.

Finally, in our April 23, 1976, letter of objection we suggested that should the county decide to use the present residency districts as single-member districts from which to elect its commissioners in the future we would evaluate them as such upon being furnished the additional information requested therein. While we note that you have responded to the request for additional information, there is no indication that the county has decided to use these districts as single-member districts. Consequently we have made no determination in that regard.

Pursuant to the court order in *United States* v. *County Commission, Hale County, Alabama, et al.* (Civ. Action No. 76-403-P), I am sending a copy of this letter to that court.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division